Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SUSAN D. BIERI
and
LEONARD D. BIERI, III,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE APPEALS COURT VIOLATED ACCEPTED PRINCIPLES OF APPELLATE REVIEW BY FAILING TO APPLY THE "CLEARLY ERRONEOUS" STANDARD AND BY INSTEAD SUBSTITUTING ITS OWN FACTUAL FINDINGS FOR THOSE OF THE DISTRICT COURT.

II. WHETHER THE APPELLATE COURT'S DEVELOPMENT OF ITS OWN FACTUAL FINDINGS AND ITS ASSUMPTION OF THE DISTRICT COURT'S PROPER ROLE DEPRIVED PETITIONERS OF THEIR RIGHT TO AN APPEAL, THEREBY VIOLATING THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

III. WHETHER THE FORFEITURE OF PETITIONERS' FARM IS PROHIBITED BY THE EIGHTH AMENDMENT ON THE BASIS THAT IT CONSTITUTES AN EXCESSIVE FINE.

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CITATIONS OF OFFICIAL REPORTS OF OPINIONS IN CASE

The opinion of the United States Court of Appeals for the Eighth Circuit whose review is sought by Petitioners was decided and filed on October 13, 1995. The opinion is reported as *United States v. Bieri*, 68 F.3d 232 (8th Cir. 1995), and is set forth in the Appendix at A4-A16.

STATEMENT OF JURISDICTION

The appeal of *United States v. Bieri* whose review Petitioners seek, was decided by a panel of the United States Court of Appeals for the Eighth Circuit on October 13, 1995. *United States v. Bieri*, Case No. 95-1234WMS, 68 F.3d 232 (8th Cir. 1995). (App. at A4.)

Petitioners filed a Petition for Rehearing by the Panel With Suggestions for Rehearing En Banc on November 6, 1995. The Petition was denied on December 7, 1995. (App. at A2.) Petitioners filed their Motion to Stay the Mandate on December 13, 1995. The Motion was granted by the Eighth Circuit Court of Appeals on December 20, 1995, ordering that the Mandate be stayed until March 6, 1996. (App. at A1.) Petitioners timely file this Petition for Writ of Certiorari on or before March 6, 1996.

The United States Supreme Court has jurisdiction to review this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1)(1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VIII states:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A. Procedural Statement of the Case

On February 14, 1992, the Government charged Leonard and Susan Bieri by a superseding indictment of four counts: Count One, conspiracy to possess with intent to distribute marijuana; Count Two, possession with intent to distribute marijuana; Count Three, use of a firearm in relation to drug trafficking. Count Four sought criminal forfeiture of the Bieris'

dairy farm. The Bieris waived trial by jury and were tried on July 8, 1992, by the United States District Court for the Western District of Missouri, Southern Division. The court found Leonard and Susan Bieri guilty of Counts One and Two. The court acquitted both on Count Three. The court declared forfeiture as to Count Four.

The district court sentenced the Bieris on April 2, 1993, and also ordered forfeiture as to Tract Four of appellees' farm, the tract where the marijuana was seized from the home and outbuildings. Leonard and Susan Bieri appealed their convictions and their sentences of fifty-seven (57) and fifty-one (51) months, respectively. Both the Bieris and the Government appealed the district court's order of forfeiture. The Bieris appealed the forfeiture of Tract 4, while the Government appealed the denial of forfeiture as to the remainder of the property. The Eighth Circuit affirmed the Bieris' sentences and convictions, *United States v. Bieri*, 21 F.3d 811 (8th Cir.), *cert. denied*, 115 S. Ct. 208 (1994), but remanded for further proceedings on the forfeiture, *United States v. Bieri*, 21 F.3d 819 (8th Cir.), *cert. denied*, 115 S. Ct. 208 (1994) (App. at A23). The Eighth Circuit held that 21 U.S.C. § 853 required forfeiture of the entire farm, but remanded so the district court could address the constitutionality of the forfeiture. The Bieris filed a consolidated Petition for Writ of Certiorari seeking review of both Eighth Circuit decisions. The Supreme Court denied the petition. (App. at A21).

On remand, the district court was directed to determine whether forfeiture of the Bieri farm constituted an "excessive fine" under the Eighth Amendment. (App. at A18-20.) On

December 20, 1994, the district court held a hearing on the forfeiture issue. Both the Government and the Bieris presented evidence at this hearing. At the end of the hearing, the district court ruled orally, denying forfeiture of any property. On December 21, 1994, the district court issued written supplemental findings which stated that the Bieri farm had an appraised value of not less than $245,000.00 and that the best interests of the Bieris' children would be served by allowing them to remain on the farm. (App. at A17.)

The government appealed the district court's orders of December 20, 1994, and December 21, 1994. The Eighth Circuit, in a two-to-one opinion issued October 13, 1995, reversed the district court's ruling. *United States v. Bieri*, 68 F.3d 232 (8th Cir. 1995). Relying largely on the nature of the Bieris' illegal actions, the alleged value of the marijuana and the dollar value of the farm, the Court concluded that forfeiture of the farm was not an excessive fine under the Eighth Amendment. (App. at A16.) Senior Circuit Judge John R. Gibson, dissenting, wrote that the Court should have remanded to the district court with directions to conduct an appropriate analysis under the Eighth Amendment's excessive fines clause. (App. at A16.)

Petitioners filed their Petition for Rehearing by the Panel with Suggestion for Rehearing En Banc on November 6, 1995. The petition was denied on December 7, 1995, with five judges indicating that they would grant rehearing en banc. (App. at A2).

Petitioners filed their Motion to Stay the Mandate on December 13, 1995. The Court granted the motion on December 20, 1995, staying the mandate until March 6, 1996. (App. at A1.)

B. Factual Statement of the Case

Leonard and Susan Bieri are dairy farmers. For ten years, they raised dairy cows and other livestock on their south-central Missouri farm, eventually establishing a Grade A milking operation.

Mr. and Mrs. Bieri are now incarcerated, serving sentences of 57 and 51 months, respectively, for their convictions on marijuana offenses. Their children, Jesse, age 11, and Sarah, age 8, are living with relatives until their parents are released. The Government seeks forfeiture of the Bieris' entire 529-acre farm even though only one of the four tracts was used to store marijuana.

The offense that gives rise to the present forfeiture action occurred on January 14, 1992. On that date, a man named George Ruiz made a controlled delivery of forty-five (45) pounds of marijuana to the Bieri farm. Police officers had stopped Ruiz as he was traveling in Oklahoma, and he gave them consent to search his vehicle. When officers discovered the marijuana, he told them that he had picked it up in Arizona and was preparing to deliver it to Leonard Bieri. Police executed an anticipatory search warrant at the Bieri farm that evening, finding additional marijuana as well as equipment for weighing and packaging it. Some of the marijuana was found

in the house, and some was found in the outbuildings on the farm, including the milking parlor.

When the Eighth Circuit in the first appeal remanded to the district court for further consideration, it directed the district court to consider "all of the circumstances of the case including the extent and length of the defendant's drug activity" in determining whether forfeiture of the entire farm would constitute an excessive fine under the Eighth Amendment. *United States v. Bieri*, 21 F.3d at 825. To permit adequate consideration of all of the factors that may play a role in an excessive fines analysis -- including not only the seriousness and nature of the crime and the connection between the offense and the property, but also the tangible and intangible value of the property, the character of the property, and the impact of the forfeiture on innocent occupants -- the district court held an evidentiary hearing on December 20, 1994. Both sides presented testimony and other evidence at the hearing.

The testimony included that of the Bieris' former field representative for Kraft General Foods, Joe Klineline, who stated that the Bieris were satisfactory producers, that they adhered to Kraft requirements, accepted his advice and updated their equipment and barn to meet accepted standards.

The Bieris had purchased their farm, a combination of pasture, crop, and timber land, in 1984. They acquired the property via a general warranty deed that was released from escrow in 1990. The irregularly shaped farm is comprised of four tracts, each separately described in the deed. Three of the tracts are in Taney County, and one is in Ozark County.

The Bieris' children, Jesse and Sarah, were also present at the evidentiary hearing so that they could testify about how they would be affected by the loss of their home and farm. Because of their young ages and the nature of their anticipated testimony, the parties stipulated to the substance of the children's testimony. The testimony subsequently was proffered through counsel, who stated she had visited at length with the children prior to the hearing. Counsel stated that the children told her, in so many words, that they were very attached to the farm and very much wished to stay there. The Bieris also presented as evidence various snapshots depicting the family's life on the farm as well as 4-H posters done by the children.

Susan Bieri also testified at the hearing, identifying the sources of funds used to pay for the farm. Mrs. Bieri testified that some of the money was obtained from the sale of another property and that friends of theirs had loaned them some money. She testified that these funds were not derived from illegal activity.

The Bieris also presented evidence as to the monetary value of the farm. Charles Crowley, a Certified General Appraiser with substantial experience in the area of farm appraisals, testified that in his opinion, the farm was worth $340,000.00. He based his conclusion on his analysis of the farm under three different appraisal approaches -- the sales comparison approach, the cost approach, and the income approach.

At the time that Mr. Crowley visited the property, the Bieris were operating a Grade A dairy farm. Mr. Crowley observed a bulk milk tank, a pipeline milker, feed tanks, and "everything that's needed to produce milk." He also stated that the Bieris' farm appeared to be similar to other dairy farms in the area. Mr. Crowley testified that the appraisal figure of $340,000.00 was based on present day value. He testified that it was possible the farm was worth 30% less in 1992, which was the year that the Bieris were arrested.

The Government also presented the testimony of a licensed appraiser, Mr. Bob Bryant. Mr. Bryant testified that he conducted his appraisal of the Bieri farm in January 1993 and appraised its value at that time as $152,400.00. He described the Bieris' property as "a typical Ozark farm."

At the forfeiture hearing, the Government presented no evidence regarding the Bieris' offense. As is stated in the procedural history, the Bieris had previously been found guilty by the Court of possession with intent to distribute marijuana and conspiracy to d the same. The Eighth Circuit affirmed their convictions and sentences.

The evidence presented at the Bieris' July 1992 trial included the testimony of George Ruiz, who stated that he was instructed by Eddie Padilla to meet Leonard Bieri at a McDonald's parking lot in Branson, Missouri, in February or March 1990. Mr. Ruiz testified that he had about sixteen pounds of marijuana that he had transported from Arizona. He testified that he followed Leonard Bieri to the farm and took the marijuana inside. He testified that he met Susan Bieri at

that time and was paid $300.00 in traveling expenses. Ruiz testified that in the fall of 1990, he again traveled from Arizona to the Bieri residence for the purpose of delivering about thirty pounds of marijuana. In March 1991, he again visited the Bieri farm but did not deliver any marijuana at that time.

On January 14, 1992, Ruiz was stopped by law enforcement officers outside Vinita, Oklahoma. Ruiz consented to the search of his vehicle, and officers discovered about forty-five pounds of marijuana. Ruiz agreed to cooperate with police, and made a controlled delivery of the marijuana to the Bieri residence. Later that evening, law enforcement officers executed an anticipatory search warrant and recovered both the marijuana that Ruiz had delivered as well as additional marijuana that had been stored in the house and outbuildings on the farm. In all, officers recovered approximately one hundred and forty-one pounds of marijuana that was stored throughout the Bieri home and the outbuildings on the farm. This included the amount delivered by Ruiz.

All of the marijuana was found on Tract 4 of the farm, where the house and all of the outbuildings are located. Law enforcement agents also recovered packaging material, a scale, and a device that seals plastic bags.

Law enforcement officers seized notes that were identified by a handwriting expert as having been written by Susan Bieri. The notes contained the figure "1250," which a special agent testified would indicate a wholesale price of $1,250.00 per pound of marijuana. The notes also included the figure "42," which an agent testified represented the forty-two pounds of

marijuana that was delivered by Ruiz. The reference in the note to "300" represented the $300.00 expense money paid to Ruiz by Susan Bieri, testified the agent.

At the Bieris' sentencing hearing, the district court stated that had it been writing on a "clean slate," it would have imposed probation on both Mr. and Mrs. Bieri. The court reiterated these statements at the December 1994 forfeiture hearing, adding that Mr. and Mrs. Bieri had "lived almost three years on bond without any criminal incidents." (App. at A18.)

At the end of the forfeiture hearing, the court orally denied forfeiture, finding that the Eighth Circuit case, *United States v. One Parcel of Real Property Located at 9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994), identified the factors that should be considered in an excessive fines analysis. The court further stated that the sentencing guidelines had required the sentences of fifty-seven (57) months and fifty-one (51) months; that the terms of imprisonment were "enough penalty for the criminal activity associated with the property"; that the property was used as both a residence and a business; that the two minor children who lived on the property "are dependent somewhat upon that residence"; that the simultaneous incarceration of both parents will cause the children to "suffer greatly"; and that when you "sentence parents you sentence children."[1] (App. at A18-A20.)

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1 The Bieris had requested that the court permit them to serve their sentences sequentially so that the children would not be deprived of the presence of both parents at the same time. The court denied this request.

The court then stated:

> As a normal rule, any time a fine is imposed within the statute or no fine is imposed, it's discretionary with the trial court. I don't know whether that's true in regard to a forfeiture or not but I'm going to test it. It's the judgment of the Court that no forfeiture of the defendants' farm be declared in this case.

(App. at A20)

The Court issued supplemental written findings the following day. In its order, the Court stated:

> As a supplement to the findings made by the Court following a hearing on the forfeiture of the Bieris' farm, the Court finds that the reasonable value of the defendants' farm is not less than $245,000.00.
>
> The Court further finds it would be in the best interests of the children that they be permitted to remain at the residence which is located on the farm.

(App. at A17.)

The United States appealed the district court's orders of December 20 and December 21, 1994. The Eighth Circuit reversed the district court's judgment and held that the forfeiture of the farm was not excessive. In a two-to-one opinion, the Eighth Circuit rejected the district court's findings, although it did not state at any point that it found such findings "clearly erroneous." In finding that forfeiture did not offend the Eighth Amendment, the appeals court relied primarily on the nature of the Bieris' alleged illegal actions, the alleged

value of the marijuana, and the dollar value of the farm (App. at A4-A16.)

REASONS FOR GRANTING THE WRIT

I. WHETHER THE APPEALS COURT VIOLATED ACCEPTED STANDARDS OF APPELLATE REVIEW BY FAILING TO APPLY THE "CLEARLY ERRONEOUS" STANDARD AND BY INSTEAD SUBSTITUTING ITS OWN FACTUAL FINDINGS FOR THOSE OF THE DISTRICT COURT.

The district court is uniquely positioned to make factual findings. The proper role of the reviewing court is to review those findings, not make them anew. These principles are long-established and beyond dispute. As this Court stated in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), a reviewing court "oversteps the bounds of its duty under [Federal Rule of Civil Procedure] 52(a) if it undertakes to duplicate the role of the lower court." *Id.* at 573. This Court added: "'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.'" *Id.* (quoting *Zenith Radio Corp v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)).

In deciding the government's appeal of the district court's order denying forfeiture, the Eighth Circuit ignored these long-standing principles and overstepped the bounds of its proper role as the reviewing court. It did so even while acknowledging that the district court "expressly considered"

the proper legal principles relevant to an excessive fines analysis and made factual findings pertinent to such an analysis. (App. at A11-A12.) Those factual findings concerned "the criminal sanctions imposed, the value of the farm, and its importance as a residence for the Bieris' innocent minor children." The claimed failure of the district court's ruling was its failure to state an "express conclusion." (App. at A12.) The Eighth Circuit's opinion also criticized the district court's use of the word "discretion," stating that the district court did not possess any discretion that it could have properly exercised in this case. (*Id.*) With no reference to the standard of review, the Eighth Circuit rejected the district court's findings although making no statement that such findings were "clearly erroneous." The appellate court's unsanctioned leap into the role of fact-finder is apparent in numerous statements such as: "Weighing the gravity of the offenses against the severity of the criminal sanctions, we find no great imbalance." (App. at A12.) Clearly, the appellate court is making its own "findings."

The Eighth Circuit's criticism of the district court's ruling elevates form over substance. First, the Eighth Circuit complains that the district court failed to recite the proper words -- "excessive fines" -- in its conclusion. Although not ritualistically reciting the supposed key words, the district court made clear that it was conducting an excessive fines analysis. It expressly considered the nature and extent of the crime, the culpability of the defendants, the severity of the punishment, the value and character of the property, and the fact that innocent occupants, the Bieris' children, lived on the property with their parents. The Eighth Circuit's complaint that the

district court failed to include the words "excessive fines" in its ruling ignores the substance of that ruling. It is well established that a district court need not utter any "magic words" if the basis for its decision is apparent. *See, e.g., United States v. Evans*, 697 F.2d 240, 249 (8th Cir. 1983), *cert. denied*, 460 U.S. 1086 (1983).

Second, the Eighth Circuit complains that the district court appeared to rely on non-existent "discretion" in making its decision.[2] Certainly, the district court could have expressed itself more artfully or with greater precision. The complaint about the district court's use of the word "discretionary" misses the mark, however. The district court's reference to discretion followed its earlier observation that it had previously decided not to impose a fine because any remaining property was needed for the family. The district court thus considered particular factors that are relevant in an Eighth Amendment analysis. Not only did it have the "discretion" to consider these factors, it was in fact directed to do so by precedent of the Eighth Circuit. *See, e.g., United States v. One Parcel of Real*

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2 The district court stated:

> I don't know why the Eighth Circuit sent the case back. There's no evidence as to the value of any particular tract -- there were four tracts. Tract four where the house and barn was [sic] located was forfeited at the time of the sentence and I felt that was appropriate because that's where the drug trafficking occurred, that's where the drugs were being stored. Obviously that was not appropriate. As a normal rule, anytime a fine is imposed within the statute or no fine is imposed, it's discretionary with the trial court. I don't whether that's true in regard to a forfeiture or not but I'm going to test it.

Property Located at 9638 Chicago Heights, 27 F.3d 327 (8th Cir. 1994); *United States v. Alexander*, 32 F.3d 1231 (8th Cir. 1994).

In any event, if the Eighth Circuit concluded that the district court made insufficient factual findings or did not conduct a complete Eighth Amendment analysis, the proper remedy was for the appeals court to remand to the district court for further findings and analysis. *See* dissent of John R. Gibson, Senior Circuit Judge, App. at A16. Instead, the Eighth Circuit usurped the role of the district court, making its own factual findings concerning the culpability of the defendants, the dependance of the children on the residence, the severity of the crime as measured against the harshness of the penalty, and the connection between the offense and the property. In so doing, the Eighth Circuit acted as a second district court, not a court of appeals. By abandoning its proper role as a reviewing court, the Eighth Circuit violated long-established principles of appellate review and, as discussed in section II, *infra,* effectively denied the Bieris their right to an appeal.

Numerous cases of the Supreme Court and the courts of appeal establish that the proper role of a reviewing court does not include deciding factual issues *de novo*. As this Court stated in *Anderson v. City of Bessemer City*, a reviewing court transgresses its boundaries if it undertakes to duplicate the role of the district court. 470 U.S. at 573. The traditional deference accorded the trial court as the finder of fact is not limited to findings that depend upon determinations of credibility. *Id.* at 574. "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Id.*

The principles of *Bessemer City* have been recognized and applied in countless cases in the lower courts. *See, e.g., Festo Corp. v. Shoketsu Kinzuko Kogyo Kabushiki Co., Ltd.*, 72 F.3d 857, 863 (Fed. Cir. 1995); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1204 (10th Cir. 1992); *Craft v. Metro Media, Inc.*, 766 F.2d 1205, 1211-12 (8th Cir. 1985) *cert. denied*, 475 U.S. 1058 (1986). In *McGee*, the Tenth Circuit recognized the proper limitations upon the role of the appellate court when it reviews the factual findings of a lower court. "We find the district court's account of the facts rational, and we refuse to duplicate the role of the factfinder." 953 F.2d at 1204. The principle that an appellate court should not engage in fact finding but should instead confine itself to a review of the facts found by the lower court applies in criminal cases as well as civil. *See, e.g., United States v. Alaniz-Alaniz*, 38 F.3d 788, 790 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1412 (1995) (applying clearly erroneous standard as defined in *Bessemer City*); *United States v. Jones*, 31 F.3d 1304, 1315 (4th Cir. 1994) (if issue turns primarily on factual determination, reviewing court applies "clearly erroneous" standard); *United States v. Brown*, 944 F.2d 1377, 1379 (7th Cir. 1991) (clearly erroneous standard of *Bessemer City* applies to findings made by district court at sentencing).

In the present appeal, the Eighth Circuit, rather than permitting the district court to cure any deficiencies in its analysis or factual findings, simply rejected the lower court's findings and issued its own. The Eighth Circuit's opinion clearly transgresses the principles of *Bessemer City* by "duplicat[ing]" the role of the lower court. *See Bessemer City*, 470 U.S. at 573. The appeals court simply rejected the lower

court's findings without finding them to be clearly erroneous. Under *Bessemer City*, this is not permissible.

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

Id. at 574.

Rejecting the analysis of the lower court, the Eighth Circuit made these findings: (1) that the extent and duration of the criminal conduct in the Bieris' case was not minimal; (2) that no great imbalance existed between the gravity of the offense and the severity of the criminal sanctions; (3) that there was rough equality between the supposed wholesale value of the marijuana and the monetary value of the farm, and that such equality was convincing evidence that the forfeiture of the entire farm was not grossly disproportionate; and (4) that the Bieris' expressed concern for their children's best interests was not persuasive given the nature of their illegal actions. (App. at A12-A16.) The court's development of its own factual findings is particularly apparent in the following passage:

> The effect of forfeiture certainly will be a hardship on the children. In reality, however, both parents are now in jail, and the children cannot remain on the farm by themselves. Children are not dependent on a

> residence, but on their parents. Here, the parents chose to engage in highly illegal conduct grossly inimical to the best interests of their children, purposefully using the children's home to do so. Their current concern for the children's best interests rings hollow given their prior willingness to use the children's home with the children living in it as a wholesale drug distribution center. While we have no doubt that the children are very attached to the farm, we cannot consider the intangible value of the farm in isolation from the culpability of both parents. We conclude that the parents' culpability in this case far outweighs the intangible value of the property and that the adverse effect of forfeiture on the children does not render the forfeiture unconstitutionally excessive.

(App. at A14-A15.)

The district court made express factual findings on these identical subjects. For instance, the district court concluded that although the Bieris had clearly violated the law, that the nature of their criminal activity was such that had the court been "writing from a clean slate," it probably would have placed the Bieris on probation. (App. at A18.) The Court then observed that the simultaneous incarceration of both parents for periods of 51 and 57 months was "enough penalty for the criminal activity associated with the property." (App. at A19.) Certainly, the district court's use of the word "enough" makes clear its conclusion that additional punishment beyond the prison terms would be "excessive." The district court also observed that the property was used as a business and a

residence, and that the Bieris' two small children were dependent upon that residence. (App. at A19, A17.)

The Eighth Circuit, apparently dissatisfied with the district court's factual findings, abandoned its role as a reviewing court and stepped into the role of fact-finder. In so doing, it violated long-established principles of appellate review and acted as a district court.

Based on the Eighth Circuit's failure to apply the proper standard of review and adhere to its proper role as a reviewing court, this Court should grant the Bieris' petition for writ of certiorari as to the decision of the Eighth Circuit.

II. WHETHER THE APPELLATE COURT'S DEVELOPMENT OF ITS OWN FACTUAL FINDINGS AND ITS ASSUMPTION OF THE DISTRICT COURT'S PROPER ROLE DEPRIVED PETITIONERS OF THEIR RIGHT TO AN APPEAL, THEREBY VIOLATING THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

When the Eighth Circuit abandoned its role as a reviewing court and stepped into the role of district court, *see* discussion at section I, *supra*, it effectively deprived the Bieris of their right to appeal. Clearly, the appellate court made its own factual findings. Because there is no right to an appeal before the Supreme Court, those findings may never be subject to review by a reviewing court. The appellate court's actions deprived the Bieris, arbitrarily and unreasonably, of their right to appeal adverse factual findings. As a result, the Bieris were

denied due process of law as guaranteed by the Fifth Amendment of the United States Constitution.

Although the Constitution does not require that criminal defendants be afforded a first appeal as of right, if the government has extended such a right, then the procedures used in deciding the appeals must comport with the due process and equal protection clauses of the Constitution. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). The Due Process Clause requires fair procedures and a fair process; such fairness is violated if an appeal is decided in an arbitrary fashion. *See Evitts,* 469 U.S. at 403-04, *see also Austin v. United States*, 115 S. Ct. 380, 381 (1994) (recognizing that indigent defendants pursuing appeals as of right have a constitutional right to the assistance of an attorney); *Anders v. State of California*, 386 U.S. 738, 742-43 (1967) (defendant was denied constitutionally required fairness and equality when appointed counsel failed to file a brief on his behalf without taking adequate steps to protect his client's rights).

In the federal court system, the appellate courts are "'an integral part of the system for adjudicating the guilt or innocence of a defendant.'" *Evitts*, 469 U.S. at 393. All defendants have a first appeal as of right from an adverse judgment in the district court. *See* 28 U.S.C. § 1291. *See also* Fed. R. App. P. 3(c) and 4(b). Clearly, the government has created a system in which a first appeal as of right is available to every defendant convicted of a criminal offense. Given the universal extension of that right, it is arbitrary and unreasonable and, thus, violative of due process if an appellate

court abandons its proper role and effectively extinguishes the right to appeal. Because there is no appeal as of right from the decision of an appellate court turned factfinder, a defendant in such a situation arbitrarily loses the right to have the decision examined by a reviewing court.

Clearly, the Eighth Circuit's failure to hew to the proper role of an appellate court violated the Bieris' constitutional right to due process. The Eighth Circuit's development of its own factual findings and its assumption of the district court's proper role was arbitrary and unreasonable and deprived the Bieris of the fair process and fair procedures demanded by the Due Process Clause. *See Evitts*, 469 U.S. at 404.

The Bieris assert that the district court in this case made adequate factual findings to support its ruling and that such findings should have been reviewed by the Eighth Circuit Court of Appeals under the appropriate standard of review. As acknowledged in *Bessemer City*, *supra*, that standard is the "clearly erroneous" one. The Bieris assert in the alternative that if the Eighth Circuit determined that the factual findings by the lower court were not adequate, then the proper remedy was for the Eighth Circuit to remand to the district court for further factual findings rather than appropriating for itself the role of factfinder. The Eighth Circuit's actions arbitrarily deprived the Bieris of their right to appeal and thus violated their constitutional right to due process of law.

Based on the foregoing, this Court should grant the Bieris' petition for writ of certiorari as to the decision of the Eighth Circuit Court of Appeals.

III. WHETHER THE FORFEITURE OF PETITIONERS' FARM IS PROHIBITED BY THE EIGHTH AMENDMENT ON THE BASIS THAT IT CONSTITUTES AN EXCESSIVE FINE

The Bieris' farm is their home, their place of business, and their primary asset. The forfeiture of the farm clearly constitutes an excessive fine within the meaning of the Eighth Amendment. As the district court properly found, the farm has significant value, not only in monetary terms, but also as the home of the family. The farm is the site of the family's business and the source of the family's livelihood. The family, including the Bieris' small children, are dependent upon the farm. Leonard and Susan Bieri are already being punished substantially through stiff prison terms. All of these factors clearly establish that the forfeiture of the Bieris' farm constitutes an excessive fine within the meaning of the Eighth Amendment. The district court properly reached this conclusion, and the Eighth Circuit erred by concluding otherwise.

To determine whether forfeiture of a defendant's property constitutes an excessive fine, the court must first determine which test properly applies to this Eighth Amendment analysis. Since this Court issued *Alexander v. United States*, 113 S. Ct. 2766 (1993) and *Austin v. United States*, 113 S. Ct. 2801 (1993), the lower courts have endeavored to translate the broad principles of those cases into well-defined tests for determining excessiveness challenges under the Eighth Amendment. In general, the courts have developed two separate, but partially overlapping approaches, the "proportionality" approach and the

"instrumentality" approach. *Cf. United States v. Real Property Located at 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D. Cal. 1994); *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995). The first approach generally encompasses a broad variety of factors, such as the value of the property and the severity of the total sentence imposed in relation to the crime, while the second focuses more narrowly on the relationship between the property and the offense. Recently, a third approach has also emerged: the combined test utilized in the Ninth Circuit. *See United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road*, 59 F.3d 974 (9th Cir. 1995). Under the latter approach, the court must conduct a two-step analysis, first considering whether the property being forfeited constitutes an instrumentality of the offense. *Id.* at 983-85. As a "check" on the harshness of that test, the court must then determine whether the magnitude of the forfeiture is proportionate to the offense committed. *Id.* In determining proportionality, the Ninth Circuit directed the district court to consider: the fair market value of the property, the intangible, subjective value of the property, the impact of forfeiture on the financial condition of the defendant's family, and the culpability of the property's owner, including whether the owner was directly involved in the illegal activity, and the degree of harm caused by the illegal activity. *Id.*

Although the various approaches adopted by the courts of appeal have common elements, a circuit split exists over the question of which test should be applied. The ongoing confusion in this area indicates the issue is ripe for review by this Court.

In the Bieris' case, the Eighth Circuit properly determined that a multi-factor, proportionality test should be applied when the forfeiture of property is challenged as an excessive fine under the Eighth Amendment. The Court stated:

> To determine whether the facts indicate gross disproportionality, the district court must consider multiple factors, including the extent and duration of the criminal conduct, the gravity of the offense weighed against the severity of the criminal sanction, and the value of the property forfeited...."'Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability and, of course, the extent that the defendant's interest and the enterprise itself are tainted by the criminal conduct.'"...This multi-factor approach does not provide an exhaustive list of factors, but it provides a helpful framework for analysis which will necessarily vary from case to case.

(App. at A11) (internal citations omitted).

Although recognizing the propriety of a multi-factor approach, the Eighth Circuit suggested that certain aspects of that approach concerning so-called "intangible factors" -- such as the property's character as a residence or the effect of forfeiture on innocent occupants and children -- are less relevant in the context of a criminal forfeiture than in the context of a civil *in rem* forfeiture. The court stated:

> [E]specially in criminal *in personam* forfeiture, the property's character as a residence and the effect of forfeiture on innocent occupants are factors whose importance diminishes as the duration and extent of the defendant's culpability and use of the property to facilitate criminal conduct rises.

(App. at A14.) The Bieris assert that the case law provides no basis for holding that the so-called intangible factors are less relevant to an analysis of a criminal forfeiture than a civil *in rem* forfeiture. Certainly, those factors may be less important in a particular case, but that is the essence of a multi-factor proportionality approach. The proper weighing and balancing of each factor will necessarily vary with the specific facts of each case. Further, as the Ninth Circuit recognized in *6380 Little Canyon Road*, this Court discounted the importance of the distinction between civil and criminal forfeitures in its discussion in *Austin v. United States*, 113 S. Ct. 2801 (1993).

The Bieris assert that the forfeiture of their entire farm, particularly that portion which includes the house and barn, constitutes an excessive fine within the meaning of the Eighth Amendment. The Bieris do not deny that the offense of which they were convicted is significant. It is widely recognized, however, that marijuana is a less harmful and threatening substance than other illegal narcotics. *See, e.g.*, United States Sentencing Guideline § 2D1.1 (providing for harsher penalties for possession of drugs such as cocaine, cocaine base, heroin, and LSD as compared with possession of marijuana). Although some evidence was presented to show that the Bieris were involved with the distribution of marijuana for

approximately a two-year period, the evidence does not suggest their involvement in an extensive drug conspiracy involving numerous individuals or extremely large amounts of drugs. It certainly does not suggest their involvement with other illegal drugs.

With regard to the harshness of the penalty, the Bieris point out that while their prison sentences are less than what they might have been had they been involved with other illegal drugs, the terms are still substantial in length. Adding to the severity of the penalty is the fact that the Bieris are incarcerated at the same time, leaving their two young children without daily care and guidance from either parent during a critical period in their young lives.

The actions of the Bieris are sharply distinguishable from those of the defendant in *United States v. Myers*, 21 F.3d 826 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 742 (1994). The defendant in *Myers* made substantial alterations to his barn and the surrounding area to facilitate and conceal a marijuana-growing operation. In essence, his farm was simply a front for illegal activities. In contrast, the Bieris obviously operated a commercially sound and legitimate dairy farm. They raised dairy cows, sold their milk to a major manufacturer of dairy products, and satisfied numerous commercial standards and requirements.

Although the Bieris' farm was used to commit a drug offense, the marijuana concealed on the property could have been concealed in almost any location. There is nothing special about a farmhouse or barn in terms of its ability to conceal

marijuana. Thus, there is no particularly strong nexus between the property and the offense.

The district court found out that the reasonable value of the Bieris' farm was not less than $245,000. (App. at A17.) The Eighth Circuit did not reject this finding. In addition to the farm's monetary value, it also possessed a substantial intangible value to the Bieris, as it is their home, the source of their livelihood, and their primary asset. Certainly, the value of property is an important factor to consider in an excessive fines analysis. The very word "proportionality" suggests that the court must weigh the magnitude of the crime against the severity of the penalty, which surely includes considering the value of the forfeitable property.

In addition to the monetary value of the property, the intangible value of the property to the Bieris is substantial. In *United States v. Real Property Located at 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D. Cal. 1994), the court recognized that a property's "intangible value" was a factor to consider in an excessive fines analysis. *See also 6380 Little Canyon Road*, 59 F.3d at 985 (recognizing intangible value of property, including its character as a residence, as a factor to be considered in an excessive fines analysis). In fact, the Eighth Circuit implicitly recognized the sanctity and importance of the home in *United States v. One Parcel of Real Property Located at 9638 Chicago Heights*, 27 F.3d 327, 331 (8th Cir. 1994). In that case, the court identified "the fact that the property was a residence" as a specific factor to be considered in evaluating the excessiveness of a forfeiture.

The Bieris' farm has been their home for 10 years. It is also the home of their children, Jesse and Sarah, who obviously would suffer from the loss of the family residence. Certainly, the intangible value of the farm is substantial and weighs heavily against the constitutionality of the forfeiture. Under such circumstances, forfeiture of the farm would constitute an excessive fine.

Based on the foregoing arguments and authorities, the Bieris submit that the forfeiture of the farm would violate the Eighth Amendment, and this Court should thus grant their Petition for Writ of Certiorari.

CONCLUSION

In this petition for Writ of Certiorari, petitioners respectfully request that this Court determine whether: (1) the court of appeals violated accepted standards of appellate review in hearing their case; (2) the appellate court's actions violated the due process rights of petitioners; and (3) the forfeiture of petitioners' farm, which is their home and the site of their business, constitutes an excessive fine within the meaning of the Eighth Amendment. In submitting this petition for Writ of Certiorari, petitioners respectfully request that this Court determine the proper standard to be applied to excessive fines challenges under the Eighth Amendment and resolve the conflict that exists among the courts of appeal on this question. Petitioners further assert that the issues presented in this petition involve important questions of federal law that implicate the Fifth and Eighth Amendments of the United States Constitution.

WHEREFORE, for the foregoing reasons, petitioners respectfully request that this Court grant their petition for writ of certiorari as to the decision of the Eighth Circuit Court of Appeals in *United States v. Bieri*, Case No. 95-1234WMS.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1234WMS

United States of America,	*	
	*	
Appellant,	*	
	*	Appeal from the
v.	*	United States
	*	District Court for
Susan D. Bieri, et al.,	*	the Western
	*	District of
Appellees.	*	Missouri

ORDER

Appellees' motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including 3/6/96. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

December 20, 1995

Order Entered at the Direction of the Court:
(/S/ Michael E. Gans)
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1234WMS

United States of America,	*	
	*	
Appellant,	*	
	*	Order Denying
v.	*	Petition for
	*	Rehearing and
Susan D. Bieri, et al.,	*	Suggestion for
	*	Rehearing En
Appellees.	*	Banc

The suggestion for rehearing en banc is denied. Chief Judge Arnold, Judge McMillian, Judge Beam, Judge Loken, and Judge Murphy would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

December 7, 1995

Order Entered at the Direction of the Court:

(/S/ Michael E. Gans)

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1234WMS

United States of America,	*	
	*	
Appellant,	*	Appeal from the
	*	United States
vs.	*	District Court for
	*	the Western
Susan D. Bieri; Leonard Bieri, III	*	District of
	*	Missouri
Appellees.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

October 13, 1995

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 95-1234

United States of America,	*
	*
Plaintiff-Appellant,	*Appeal from the
	*United States
v.	*District Court for
	*the Western
Susan D. Bieri;	*District of
Leonard D. Bieri, III,	*Missouri.
	*
Defendants-Appellees.	*

Submitted: June 15, 1995
Filed: October 13, 1995

Before WOLLMAN, JOHN R. GIBSON, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

This is an appeal after remand of a criminal forfeiture case under 21 U.S.C. § 853(a)(2) (requiring forfeiture of the whole of a person's property when that person used any part or all of it to commit or to facilitate drug trafficking offenses). In our prior opinion, we reversed the district court's order to forfeit only part of the Bieris' farm and remanded for further

proceedings, concluding that the whole farm should be forfeited unless on remand the district court found that forfeiture of the whole violates the Excessive Fines Clause of the Eighth Amendment. *See United States v. Bieri*, 21 F.3d 819 (8th Cir.), *cert. denied*, 115 S. Ct. 208 (1994). On remand, the district court ordered no forfeiture, and the government now appeals. We reverse and remand with directions to the district court to enter an order forfeiting the entire farm.

I. Background.

Susan and Leonard Bieri were charged in count I, count II, and count III of a superseding indictment with federal drug trafficking and firearm offenses and were charged in count IV with using real property to commit or to facilitate their drug trafficking offenses (criminal forfeiture). Following a bench trial, the district court convicted the Bieris on counts I and II (the drug trafficking offenses). We affirmed the Bieris' convictions and sentences on appeal. *See Bieri*, 21 F.3d at 825.

The district court also ordered criminal forfeiture of some of the real property charged in count IV, specifically finding that the parcel of land where the defendants' house and barn are located (tract four of the four-tract dairy farm) was used to commit or to facilitate the commission of the Bieris' drug trafficking offenses. See 21 U.S.C. § 853 (a)(2). The district court ordered forfeiture of only tract four. In a separate appeal, we reversed the district court's order of forfeiture and remanded for further proceedings. *United States v. Bieri*, 21 F.3d 819 (8th Cir.), *cert. denied*, 115 S. Ct. 208 (1994). We noted that section 853(a)(2) mandates forfeiture of the whole "property" if any part of it is used to commit or to facilitate the

drug trafficking offense. *Id.* at 823. We then determined that "property under section 853(a)(2) is best defined not by historic land descriptions, but by the instruments that created the defendant's interest in the property. *Id.* at 823-24. Because the Bieris acquired the whole, four-tract, contiguous farm at a single time and in a single instrument, we concluded that the farm is one piece of "property" for purposes of criminal forfeiture and that the district court erred by considering each historically-described tract separately. *Id.* at 824. We held that section 853(a)(2), in this case, mandates forfeiture of the entire farm because part of it was used to commit or to facilitate a drug trafficking offense. *Id.*

We also noted in our prior opinion that criminal forfeiture is a fine within the meaning of the Eighth Amendment's Excessive Fines Clause. *Id.* (citing *Alexander v. United States*, 113 S. Ct. 2766, 2775-76 (1993)). Accordingly, we determined that the district court must consider whether the criminal forfeiture amounts to an excessive fine; the district court could order forfeiture of less than the whole if necessary to tailor the forfeiture "to fit within the broad boundaries of constitutional proportionality." *Id.* In conclusion, we provided the district court with the following instructions:

> [We] remand to the district court for the entry of a judgment forfeiting the entire farm, unless the district court on remand determines that the forfeiture of the entire farm amounts to a constitutionally excessive fine under the Eighth Amendment, in which case the district court should enter such judgment of forfeiture as it deems in accord with the Constitution.

Id. at 825.

On remand, the district court held a hearing and took additional evidence. At the conclusion of the hearing, the district court ruled from the bench, declaring no forfeiture whatsoever in this case. The district court first noted that it would have ordered probation in this case had it found a basis to do so under the Sentencing Guidelines, but because it found no basis for departure, it was required to sentence Susan Bieri to 51 months of imprisonment and Leonard Bieri to 57 months. In the district court's opinion, these terms of imprisonment are "enough penalty for the criminal activity associated with the property." (Hr'g Tr., Dec. 20, 1994, at 87.) The district court found it significant that the property was used as a residence as well as a business and that two minor children "are dependent somewhat upon that residence." (Id.) In conclusion, the district court stated as follows:

> I don't know why the Eighth Circuit sent the case back. There's no evidence as to the value of any particular tract -- there were four tracts. Tract four where the house and barn was [sic] located was forfeited at the time of sentence and I felt that was appropriate because that's where the drugs were being stored. Obviously that was not appropriate. As a normal rule, any time a fine is imposed within the statute or no fine is imposed, it's discretionary with the trial court. I don't know whether that's true in regard to a forfeiture or not but I'm going to test it.

> It's the judgment of the Court that no forfeiture of the defendants' farm be declared in this case.

(*Id.* at 88-89.) The following day, the district court filed a written order supplementing the findings made at the hearing. In the written order, the district court found "that the reasonable value of the defendants' farm is not less than $245,000," and "that it would be in the best interests of the children that they be permitted to remain at the residence which is located on the farm." (Appellant's App., Tab S, at 79.)

The government appeals, contending that the district court failed to follow the instruction of our prior opinion either to forfeit the whole farm, or in the alternative, to forfeit such portion of the farm as the Constitution will allow upon express factual findings supporting a determination that forfeiture of the whole would constitute an excessive fine.

II. Discussion.

The express basis for the district court's decision to order no forfeiture upon remand was the district court's determination that forfeiture is discretionary, akin to the decision of whether to award a statutory fine. We do not agree with this assessment.

To determine whether property is forfeitable under 21

U.S.C. § 853(a)(2),[1] the district court's only inquiry is whether the defendant used the property "in any manner or part" to commit or to facilitate a drug trafficking offense. If so, criminal forfeiture under this statute is mandatory, not discretionary. See 21 U.S.C. § 853(a) (mandating that the person "shall forfeit" and the court "shall order . . that the person forfeit to the United States all property described in this subsection"). The district court at sentencing clearly found that the Bieris used parts of their dairy farm to facilitate their drug trafficking offenses. Thus, the entire farm was forfeitable under section 853(a), and the mandatory language of the statute does not

---

1 Section 853(a) states in part as follows:

> (a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States . . .
>
> (1) any property constituting . . . proceeds . . .;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of, such violation; and
>
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise . . . any interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.
>
> The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. . . .

21 U.S.C. § 853(a)(emphasis added).

leave forfeiture to trial court discretion. *See Bieri*, 21 F.3d at 824.

To sustain forfeiture of less than the whole in this circumstance, the Constitution imposes an additional layer of analysis. The Eighth Amendment prohibits the government from imposing excessive fines. The Supreme Court has plainly announced that criminal forfeiture, which is an *in personam* proceeding, is "clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'" *Alexander*, 113 S. Ct. at 2775-76. Thus, courts must engage in a fact-intensive analysis under the Eighth Amendment Excessive Fines Clause to ensure that the forfeiture is not an excessive penalty, and courts may forfeit less than what the statute requires if necessary "to preserve the forfeiture by tailoring it to fit within the broad boundaries of constitutional proportionality." *Bieri*, 21 F.3d at 824.

Although the Supreme Court has declined to establish a multi factor test for determining when a fine is unconstitutionally excessive, *see Austin v. United States*, 113 S. Ct. 2801, 2812 (1993), our cases give some guidance. Preliminarily, "the defendant has the initial burden of making a prima facia showing of 'gross disproportionality.'" *United States v. Alexander*, 32 F.3d 1231, 1235 (8th Cir. 1994) (*Alexander II*) (quoting *United States v. Sarbello*, 985 F.2d 715, 724 (3d Cir.' 1993)) (other citations omitted). Second, "'the [E]ighth [A]mendment demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime.'" *Id.* at 1237 (alterations in original) (quoting *Sarbello*, 985 F.2d at 724).

To determine whether the facts indicate gross disproportionality, the district court must consider multiple factors, including the extent and duration of the criminal conduct, the gravity of the offense weighed against the severity of the criminal sanction, and the value of the property forfeited. *Id.* at 1235-36; *see also Bieri*, 21 F.3d at 824 (stating court must evaluate "all the circumstances of the illegal activity including the extent of the defendants' criminal drug activities and the amount of time that they conducted those activities"). "'Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability and, of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct.'" *Alexander II*, 32 F.3d at 1236-37 (quoting *Sarbello*, 985 F.2d at 724). This multi factor approach does not provide an exhaustive list of factors, but it provides a helpful framework for analysis which will necessarily vary from case to case. *See id.* at 1237.

In the present case, as already noted, the district court on remand ordered no forfeiture at all. We must determine whether the district court properly performed an Eighth Amendment analysis to justify the order of no forfeiture. At the remand hearing, the district court stated that some factors to consider in determining whether or not a forfeiture is excessive are (1) the value of the property, (2) the criminal activity associated with the property, (3) the effect of property on innocent occupants, and (4) whether the property is used as a residence. (*See* Hr'g Tr., Dec. 20, 1994, at 86.) Thus, the district court expressly considered the Eighth Amendment analysis and made relevant fact-findings concerning the criminal sanctions imposed, the value of the farm, and its importance as

a residence for the Bieris' innocent minor children. The district court's order of no forfeiture, however, lacks an express conclusion that on the basis of these facts, forfeiture of the whole farm would constitute an excessive fine in violation of the Eighth Amendment. Rather, it rests upon a purported exercise of discretion which did not and does not exist. Based upon our review of the facts found by the district court and of the record, as articulated below, we hold that the district court's order of no forfeiture is not justified by the Eighth Amendment.

The record indicates that the extent and duration of the criminal conduct in this case was not minimal. The conspiracy to possess and to distribute marijuana lasted nearly two years, and the Bieris' farm, though not used solely for illicit purposes, was integral to the marijuana distribution conspiracy as it provided cover, storage, and a center of distribution for the illegal activity. Throughout this period, the Bieris distributed from their farm, or possessed at their farm with the intent to distribute, a total of 85 kilograms of marijuana, which had a wholesale price of $1,250 per pound. Thus, the wholesale value of marijuana involved in the conspiracy totaled approximately $233,750.

Weighing the gravity of the offenses against the severity of the criminal sanctions, we find no great imbalance. The Bieris do not deny that their offenses of conspiracy to distribute and to possess with intent to distribute a large amount of marijuana were significant. We note that their continuing criminal conduct was intentional and willful. The Bieris received sentences of imprisonment totaling 51 months for Susan and 57 months for Leonard, which were at the bottom of the applicable Sentencing Guidelines ranges. Together, the

Bieris were subject to fines of up to six million dollars, yet the district court imposed no fines.

The district court found that the value of the farm was worth no less than $245,000 at the time of the Bieris' arrest. This amount is roughly equal to the wholesale value of the marijuana that was brought to the farm or distributed from the farm during the life of the conspiracy ($233,750). We find this to be convincing evidence that forfeiture of the entire farm is not grossly disproportionate to the criminal conduct.

The district court evidently gave great weight to the impact of forfeiture on the Bieris' children. The Bieris urge us to consider the intangible value of the property, including the fact that it is a residence and that the forfeiture will have an adverse impact upon their two minor children, when considering the proportionality of the forfeiture, citing *United States v. One Parcel of Real Property Located at 9638 Chicago Heights, St. Louis*, 27 F.3d 327, 330-31 (8th Cir. 1994) (indicating in dicta that district court should consider that the property is a residence and the effect of forfeiture on innocent occupants and children). The government, on the other hand, argues that we ought not make value judgments based upon intangibles or different lawful uses of property.

We conclude that the dicta in *Chicago Heights* enumerating intangible factors, including the property's character as a residence or the effect of forfeiture on innocent occupants and children, may be relevant to the Eighth Amendment analysis in some cases. This may be true in civil *in rem* forfeiture cases where the owner has not been convicted of any crime. *See United States v. Real Property at 6625*

Zumierez Drive, 845 F. Supp. 725 (C.D. Cal. 1994) (forfeiture of residence was found to be excessive where property owner was acquitted of state criminal drug charges). However, especially in criminal *in personam* forfeiture, the property's character as a residence and the effect of forfeiture on innocent occupants are factors whose importance diminishes as the duration and extent of the defendant's culpability and use of the property to facilitate criminal conduct rises. "It is in the light of the extensive criminal activities which [defendants] apparently conducted through this [criminal] enterprise over a substantial period of time that the question of whether or not the forfeiture [is] 'excessive' must be considered." *Alexander*, 113 S. Ct. at 2775. Our multi factor approach to the proportionality analysis allows for this type of weighing and balancing, which will necessarily vary with the specific facts of each case.

In this case, both parents knowingly and willfully used the family dairy farm, including the residence of the children, to successfully conceal their marijuana distribution operation for nearly two years before their arrest. The effect of forfeiture certainly will be a hardship on the children. In reality, however, both parents are now in jail, and the children cannot remain on the farm by themselves. Children are not dependent on a residence, but on their parents. Here, the parents chose to engage in highly illegal conduct grossly inimical to the best interests of their children, purposefully using the children's home to do so. Their current concern for the children's best interests rings hollow given their prior willingness to use the children's home with the children living in it as a wholesale drug distribution center. While we have no doubt that the children are very attached to the farm, we cannot consider the intangible value of the farm in isolation from the culpability of both

parents. We conclude that the parents' culpability in this case far outweighs the intangible value of the property and that the adverse effect of forfeiture on the children does not render the forfeiture unconstitutionally excessive.

We bear in mind that the essential inquiry for purposes of *in personam* criminal forfeiture is "whether the value of the property being forfeited is an excessive monetary punishment in relation to the offense giving rise to the forfeiture." *United States v. Wild*, 47 F.3d 569, 675 (4th Cir.), *petition for cert. filed*, (U.S. May 18, 1995) (No. 94-9553). The record does not support the Bieris' assertion of gross disproportionality arising from the forfeiture of their whole farm, and allowing the government to extract a fine in the amount of this forfeiture is not "'more criminal than the crime.'" *Alexander II*, 32 F.3d at 1237 (quoting *Sarbello*, 985 F.2d at 724). In our view, it cannot be excessive in a constitutional sense to take tainted property from criminals when that property is roughly equal in value to the total dollar volume of the criminal activity the criminals conducted or facilitated by using the property, and which property is worth far less than the legislatively authorized statutory fines. *See United States v. Myers*, 21 F.3d 826, 830 (8th Cir. 1994) (noting that, given the broad language of § 853(a) and large monetary fines authorized by Congress, "a successful proportionality challenge to criminal forfeiture will be a rare occasion"), *cert. denied*, 115 S. Ct. 742 (1995); *see also United States v. Libretti*, 38 F.2d 523, 521 (10th Cir. 1994) (holding forfeiture within statutory fine not excessive), *cert. granted*, 115 S. Ct. 1398 (Mar. 27, 1995) (No. 94- 7427).

III. Conclusion.

The district court's decision not to forfeit the farm was not justified by the district court's findings of fact or by the Eighth Amendment. We conclude that forfeiture of the entire farm is required by section 853(a)(2), and that this forfeiture is not an excessive fine in violation of the Eighth Amendment. Accordingly, we reverse the order of the district court and remand, directing the district court to enter an order declaring forfeiture of the entire farm.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent. In the first appeal of this case we remanded to the district court with directions to conduct an analysis under the excessive fines clause of the Eighth Amendment with respect to the forfeiture of the farm. It is evident that the district court's order does not do so. I would simply remand to the district court once again with directions to conduct such an analysis. I do not believe that our court should conduct such an analysis on the record before us. I think the district court's analysis should take into consideration the inquiry outlined in *United States v. Alexander*, 32 F.3d 1231, 1235-37 (8th Cir. 1994), and *United States v. 9638 Chicago Heights*, 27 F.3d 327, 331 (8th Cir. 1994).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 92-03044-01/02-
	)	CR-S-4
SUSAN D. BIERI, and	)	
LEONARD BIERI, III,	)	
	)	
Defendants.	)	

ORDER

As a supplement to the findings made by the Court following a hearing on the forfeiture of the Bieris' farm, the Court finds that the reasonable value of the defendants' farm is not less than $245,000.00.

The Court further finds that it would be in the best interests of the children that they be permitted to remain at the residence which is located on the farm.

IT IS SO ORDERED.

RUSSELL G. CLARK, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Date: December 21, 1994

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUSSELL G. CLARK
UNITED STATES DISTRICT JUDGE
December 20, 1994

•••

THE COURT: Well, apropos to Mr. Monroe's statement that there is no definitive case law relative to the matter to be considered in the case of a forfeiture may be correct but in the 9638 Chicago Heights case,, while it may be a dicta, in my opinion the Eighth Circuit very clearly stated some of the matters which should be considered by the trial court in considering a forfeiture and as to whether or not the forfeiture involved an excessive fine and was unconstitutional.

Those factors are the value of the property, the criminal activity associated with the property, the effect of property on innocent occupants and whether or not the property is used as a residence. Then it went on and said or may consider other factors which might be required.

Now, I've read the sentencing transcript and at the time of the sentence I very specifically stated if I were writing from a clean slate I would probably put the defendants on probation. Under the sentencing guidelines I did not think there was any basis for a downward departure -- we're not talking about sentencing now, we're talking about forfeiture -- but this is one of the matters that I can look at in regard to the issue of forfeiture.

Mr. and Mrs. Bieri have lived almost three years on bond without any criminal incidents and this, to a great extent, confirms what I stated at the time of sentencing, that if I were

writing from a clean slate that I would probably put them on probation.

Now, in regard to the criminal activity associated with the property, Susan Bieri was sentenced to 51 months, Leonard Bieri was sentenced to 57 months. This is enough penalty for the criminal activity associated with the property. I don't think there's any question but what -- well, the property was used as a residence, but any farm residence is connected with a business, whatever the agricultural activity might be, but it's still a residence, and there's absolutely no question but what we have two minor children that are dependent somewhat upon that residence.

Also at the time of sentencing I did not impose a fine, not because of the forfeiture, but -- and in the commitment order I very specifically stated no fine was imposed because the defendants were not financially able to pay a fine, and in the sentencing transcript I did not say that no fine was being imposed merely because of forfeiture. I said there was a forfeiture and that any balance of the property needed -- any balance of the property was needed. That's the most that I said.

Now, I have read the law review article which the defendants and their attorneys attached to some of their pleadings. I've read it in their entirety. It's a matter that should be sent to the United States Congress and to the Sentencing Commission and not to the sentencing court. I agree with it wholeheartedly. Not only when you sentence parents you sentence children, and Mr. and Mrs. Bieri should have been thinking about that when they were involved in criminal activity.

So even though I know the two children will suffer greatly from the fact that their parents are incarcerated, that's a decision that they made.

Now, the statement that Mr. Monroe made at the time of the criminal activity the defendants made their property forfeitable, that may be correct, but they also came up with a 51- and 57- month sentence.

I don't know why the Eighth Circuit sent the case back. There's no evidence as to the value of any particular tract -- there were four tracts. Tract four where the house and barn was located was forfeited at the time of sentence and I felt that was appropriate because that's where the drugs trafficking occurred, that's where the drugs were being stored. Obviously that was appropriate. As a normal rule, any time a fine is imposed within the statute or no fine is imposed, it's discretionary with the trial court. I don't know whether that's true in regard to a forfeiture or not but I'm going to test it.

It's the judgment of the Court that no forfeiture of the defendants' farm be declared in this case.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 3, 1994

Mr. James R. Wyrsch
1101 Walnut St., 13th Floor
Kansas City, MO 64106-2122

Re: Susan Bieri and Leonard D. Bieri, III
v. United States
No. 94-284

Dear Mr. Wyrsch:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

William K. Suter, Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2157/2372/2373WMS

United States of America,	*	
	*	
Appellee/Cross-Appellant,	*	Order Denying Petition for Rehearing
	*	and Suggestion for
vs.	*	Rehearing En Banc
	*	
Susan Bieri and Leonard Bieri,	*	
	*	
Appellants/Cross-Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 20, 1994

Order Entered at the Direction of this Court:

(/S/ Michael E. Gans)

Clerk, U.S. Court of Appeals, Eighth Circuit

No. 93-2373

United States of America, *
*
Plaintiff - *
Appellant, *
*
v. *
*
Susan D. Bieri, *
*
Defendant- *
Appellee. *

Submitted: November 8, 1993
Filed: April 13, 1994

Before HANSEN, Circuit Judge, JOHN R. GIBSON,* Senior Circuit Judge, and JACKSON,** District Judge

HANSEN, Circuit Judge.

*The HONORABLE JOHN R. GIBSON was an active judge of this circuit at the time this case was submitted and took senior status on January 1, 1994, before the opinion was filed.

**The HONORABLE CAROL E. JACKSON, United States District Judge for the Eastern District of Missouri, sitting by designation.

Susan and Leonard Bieri appeal the district court's order of criminal forfeiture pursuant to 21 U.S.C. § 853(a)(2) of what we shall refer to as "tract four" of the Bieris' four-tract dairy farm, and the government cross-appeals. The Bieris contend that the district court erred by (1) applying the wrong standard of proof to determine forfeitability, (2) using improperly obtained evidence to support the order of forfeiture, and (3) failing to consider proportionality under the Eighth Amendment. On cross-appeal, the government contends that the district court erred in ordering forfeiture of only one tract of the farm. We affirm in part and reverse in part.

I. BACKGROUND

In this case, we address the Bieris' appeal of the district court's order of criminal forfeiture. In a separate opinion which we also file today, we affirm the Bieris' criminal convictions and set forth in detail the facts upon which the district court convicted the Bieris of criminal drug charges. *See United States v. Bieri*, Nos. 93-1870 & 93-1872, slip op. at 2-3 (8th Cir. Mar., 1994). We will repeat here only those facts necessary for resolution of the forfeiture issues.

Susan and Leonard Bieri acquired a dairy farm by warranty deed in January of 1984. The single deed describes four tracts of real property; three of the tracts are located in Taney County, Missouri, and one in Ozark County, Missouri. (Appellants' App. at 66.) The four tracts are contiguous. The farm's house and outbuildings are located in tract four.

In January of 1992, law enforcement officers obtained and executed a search warrant for the Bieris' farm. Pursuant to the

warrant, the officers seized approximately 141 pounds of marijuana, cash, a loaded gun, brown wrapping material, and other drug paraphernalia, all found in the house and outbuildings on tract four. Subsequently, a grand jury indicted Susan and Leonard by a superseding indictment on charges of conspiracy to possess with intent to distribute marijuana, possession with intent to distribute marijuana, use of a firearm in relation to a drug trafficking offense, and forfeiture of their farm which was alleged to have been used to commit or to facilitate drug trafficking. The Bieris moved to suppress the evidence obtained as a result of the search, but the district court overruled the motions. Following a bench trial, the district court acquitted the Bieris of the firearm charges and convicted them of conspiracy to possess with intent to distribute marijuana. The district court found by a preponderance of the evidence that the Bieris had used their property to facilitate drug trafficking. At the sentencing hearing, the district court ordered forfeiture only of tract four of the farm containing the house and outbuildings. The Bieris appeal, and the government cross-appeals, the order of forfeiture.

II. DISCUSSION

The Bieris first argue that the district court erred in applying a preponderance of the evidence standard to determine that the Bieris used their property for drug trafficking, rather than requiring the government to prove that fact beyond a reasonable doubt.

We begin our analysis with the language of the statute because the applicability of the reasonable doubt standard depends upon how the Congress has defined the offense. *McMillan v.*

Pennsylvania, 477 U.S. 79, 85 (1986). It is a fundamental principle that due process requires the government to prove guilt in a criminal proceeding beyond a reasonable doubt as to each element of an offense. *See In re Winship*, 397 U.S. 358, 361-64 (1970). A sentencing sanction, however, comes into play only after the defendant has been found guilty of an offense beyond a reasonable doubt, and a factor used to determine the sentence does not itself invoke the right to proof beyond a reasonable doubt. *See McMillan*, 477 U.S. at 86; *United States v. Galloway*, 976 F.2d 414, 425 (8th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1420 (1993). *See also United States v. Coleman*, 990 F.2d 419, 421 (8th Cir. 1993) (prove factual prerequisites to sentence enhancement by a preponderance of the evidence). The language of section 853(a) indicates that Congress intended criminal forfeiture of property to be a punishment and the use of the property to commit or to facilitate a drug trafficking offense to be its factual underpinning, and not a separate offense. Section 853(a) states in part as follows:

> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law
>
> —
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> (2) any of the person's property used, or intended to be

> used, in any manner or part, to commit, or to facilitate the commission of, such violations;...
>
> • • • •
>
> The court, in imposing sentences on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection....

21 U.S.C. § 853(a).

Section 853(a) does not explicitly state what standard of proof is required for criminal forfeiture. Section 853(a) expressly states, however, that it shall apply to persons convicted of a drug offense and that in imposing sentence on such a person, the court must, "in addition to any other sentence imposed," order forfeiture of all property described in section 853(a). 21 U.S.C. § 853(a); *see also United States v. Elgersma*, 971 F.2d 690, 692-93 (11th Cir. 1992) (en banc). Congress has clearly designated criminal forfeiture as part of the sentencing or punishment phase of a criminal proceeding and has given no indication that a higher standard of proof applies than normally applies at sentencing. Thus, although charged as a count in the indictment, criminal forfeiture is neither an element of a criminal offense nor a criminal offense itself. Therefore, proof beyond a reasonable doubt is neither constitutionally nor statutorily mandated. *See Elgersma*, 971 F.2d at 693-94.

Furthermore, section 853(d) creates a rebuttable pre-

sumption that property is subject to criminal forfeiture "if the United States establishes by a preponderance of the evidence that" the defendant acquired the property during the period of the drug violation or within a reasonable time thereafter and that there was no likely source for the property other than drug proceeds. "This presumption would have no significance if the government was still required to prove forfeiture beyond a reasonable doubt" of property acquired by drug proceeds under section 853(a)(1). *Elgersma*, 971 F.2d at 694. The presumption of section 853(d) is a clear indication that Congress intended criminal forfeiture under section 853(a)(1) (property acquired with drug proceeds) to be proven by a preponderance of the evidence. There is no similar presumption or statement of the burden of proof relating to section 853(a)(2) (property used to facilitate a drug crime) which applies to the Bieris' case. Nevertheless, it is significant that section 853 gives no indication that Congress intended a higher standard of proof for property used to commit or to facilitate a drug crime under section 853(a)(2) than is required for property acquired with the proceeds of a drug violation under section 853(a)(1). Absent either a constitutional requirement or statutory language indicating a higher burden of proof, there is simply no principled distinction between the two types of forfeitable property that would justify a higher burden of proof to forfeit property used to facilitate a drug crime than is required to forfeit property acquired with drug proceeds. The defendant's putative property rights in both kinds of property are identical. "No federal court of appeals...has construed section 853 to differentiate between proceeds of the offense and other property on the burden of proof necessary for forfeiture." *United States v. Smith*, 966 F.2d 1045, 1051 (6th Cir. 1992) (a § 853(a)(2) case).

Other circuits that have considered the issue have held that the preponderance of the evidence standard is the proper standard in criminal forfeiture cases. *See Elgersma*, 971 F.2d at 694-97; *Smith*, 966 F.2d at 1052; *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1577 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990); *United States v. Sandini*, 816 F.2d 869, 875-76 (3d Cir. 1987). We agree. Accordingly, we conclude that the district court did not err in determining the forfeitability of the Bieris' property by using a preponderance of the evidence standard.

The Bieris contend that this court's statement in *United States v. Wiley*, 997 F.2d 378, 384 (8th Cir.), *cert. denied*, 114 S. Ct. 600 (1993), that "[o]ur standard for reviewing the jury's finding of forfeiture is whether, in the light most favorable to the prosecution, any reasonable jury could have found the property forfeitable beyond a reasonable doubt," is controlling. We disagree. We find that this statement has been severely undercut by two United States Supreme Court cases filed the same day that we filed *Wiley*.[1] *See Alexander v. United States*, 113 S. Ct. 2766 (1993); *Austin v. United States*, 113 S. Ct. 2801 (1993). In *Alexander*, the Supreme Court stated that criminal forfeiture "is clearly a form of monetary punishment" and should be analyzed under the Excessive Fines Clause of the

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1 We also note that the *Wiley* court offered no analysis to justify the standard articulated, and more importantly, the standard of proof was not at issue in *Wiley*. The *Wiley* court merely applied the standard of proof that the district court had applied, and that standard was no questioned on appeal.

Eighth Amendment.[2] 113 S. Ct. at 2775-76. In *Austin*, the Court held that civil forfeiture also is a form of punishment subject to Eighth Amendment limitations of the Excessive Fines Clause. 113 S. Ct. at 2812. These cases clearly indicate that forfeiture, either criminal or civil, is intended to be a form of punishment akin to a sentencing enhancement, and not a separate offense. Thus, our statement in *Wiley* can no longer be binding authority on the correct burden of proof in forfeiture cases, if it ever was.

The Bieris next argue that the forfeiture is improper because the district court erroneously relied on evidence obtained pursuant to an invalid search warrant to support the order of forfeiture. Because we conclude today in the Bieri's criminal appeals that the anticipatory search warrant was valid, this argument fails. *See Bieri*, Nos. 93-1870 & 93-1872, slip op. at 3-8.

The Bieris' final argument, concerning the proportionality of the forfeiture, is intertwined with the government's

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2 Alexander involved forfeiture under the Racketeer Influenced and Corrupt Organizations Act (RICO), pursuant to 18 U.S.C. § 1963(a). This statute requires in part that "[t]he court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection." 18 U.S.C. § 1963(a). This language is identical to that found in 21 U.S.C. § 853(a). Thus, we conclude that the same Eighth Amendment Excessive Fines analysis applies for criminal forfeiture under 21 U.S.C. § 853(a). We note, however, that while a portion of the forfeiture language is the same, RICO does not contain any provision like § 853(d), and the statutory analogy cannot be completely carried over to the burden of proof. *See United States v. Pelullo*, 14 F.3d 881, 902-03 (3d cir. 1994). We also note a different legislative history for the drug forfeiture statute. *See id.* at 903.

contention on cross-appeal that the district court erred in forfeiting only one tract of the farm. Before addressing the proportionality of the forfeiture, we must define what portion of the Bieris' farm is "property" subject to forfeiture under section 853. The government contends that the district court should have forfeited the entire farm, and the Bieri's contend that the district court correctly considered the farm as four separate tracts and only forfeited one of them.

Section 853(a) states in relevant part that a person convicted of a drug offense "shall forfeit to the United States... any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a drug offense. 21 U.S.C. § 853(a)(2). "By specifying that property is subject to forfeiture if it was used 'in any manner or part' to commit or facilitate a drug offense, Congress plainly provided for forfeiture of property even where only a portion of it was used for the prohibited purposes." *United States v. Littlefield*, 821 F.2d 1365, 1367 (9th Cir. 1987). Thus, if a defendant uses any part of a piece of property to commit or to facilitate a drug offense, the district court is required to forfeit the whole property. *See Smith*, 966 F.2d at 1053.

There remains some uncertainty in spite of the clear language of the statute does not clearly define what constitutes one piece of "property." Congress provided only minimal guidance, stating that a liberal construction of section 853 is necessary "to effectuate its remedial purposes." 21 U.S.C. § 853(o). The Sixth Circuit in *Smith* held that a four-tract farm should be treated as four separate properties because the property consisted of four separate tracts purchased in four separate instruments of transfer executed on four separate

dates. 966 F.2d at 1054. The *Smith* court found that the natural source for defining "property" subject to forfeiture is the instrument creating the defendant's interest in the property. *See id.* at 1053; *see also United States v. Reynolds*, 856 F.2d 675, 676-77 (4th Cir. 1988) (same analysis under civil forfeiture statute). We agree. Although the owner may view a single piece of property as separable tracts, the owner's subjective characterization of the property cannot serve as the basis for determining what constitutes "property" under section 853. *See Smith*, 966 F.2d at 1053. We adopt the Sixth Circuit's rule that "tracts of real property subject to forfeiture under section 853 are defined by the instruments and documents that created the defendant's interest in the property." *Id.* at 1054.

Unlike Smith, who acquired his four-tract farm in four separate instruments, the Bieris acquired all four tracts comprising their farm as a single unit in a single deed. The deed describes four individual but contiguous tracts of real property, historically described as separate tracts but owned and conveyed as a single unit even before the Bieris' purchase of the property. The historical description of the property, like the owner's subjective characterization of the property, is inapposite. The critical facts are that the Bieris purchased the property as a whole, at a single time, that it was conveyed to them in one instrument, and that the property is contiguous. These facts indicate that the property is in fact a single unit for purposes of section 853(a), and this interpretation is consistent with the congressionally mandated liberal construction and remedial purpose of section 853(a). *See* 21 U.S.C. § 853(o). We conclude that section 853(a) required the district court to forfeit the whole farm, and therefore, the district court erred in

forfeiting only tract four.[3]

Finally, we address the Bieris' constitutional claim that the forfeiture of their property amounts to an excessive fine and cruel and unusual punishment in violation of the Eighth Amendment. The Eighth Amendment's prohibition against cruel and unusual punishment does not apply in the context of criminal forfeiture. *See Alexander*, 113 S. Ct. at 2775 (Cruel and Unusual Punishment Clause is concerned with the durations and conditions of confinement). However, the Eighth Amendment's prohibition against excessive fines applies because a criminal forfeiture is a "fine" for purposes of the Excessive Fines Clause. *Id.* at 2775-76. Accordingly, courts must consider the proportionality of the forfeiture, which requires a fact-specific evaluation of all the circumstances of the illegal activity including the extent of the defendants' criminal drug activities and the amount of time that they conducted those activities in order to determine whether the forfeiture was unconstitutionally "excessive." *See id.* at 2776. If the district court determines that the forfeiture constitutes an unconstitutionally excessive fine given the specific facts of a particular case, the district court may then order forfeiture of less than the

---

3 The dissent's call to have a particularized finding of fact as to what "portion" of the entire farm was used to facilitate the drug dealing in order to define what property is forfeitable would render meaningless the Congress's mandate that the whole of the property should be forfeited if used "in any manner or part" for illegal purposes. 21 U.S.C. § 853(a)(2). As the dissent points out, the record already contains the trial court's findings that "I don't think there's any question whatsoever but what this farm was being used to facilitate drug trafficking." (Trial Tr. at 139.) In our view, the dissent fails to distinguish between what property Congress has declared to be forfeitable by statute and what property the Constitution will allow to be forfeited in any particular case.

whole in an effort to preserve the forfeiture by tailoring it to fit within the broad boundaries of constitutional proportionality.

The Bieris argue that their criminal activity was not extensive, that it did not encompass a substantial period of time, and that only a minimal relationship existed between the property and their criminal offenses. The district court's order of forfeiture does not contain any findings of fact on the proportionality issue. Although the district court ordered forfeiture of only one tract of the forfeitable property, the court did not indicate that it engaged in a proportionality analysis that required this result. In order for this court to provide a meaningful review, the district court must make express findings of fact to support its proportionality analysis. The district court may order forfeiture of less than the whole farm only upon express factual findings supporting a determination that, based upon all of the circumstances of the case including the extent and length of the defendant's drug activity, forfeiture of the whole would be an excessive fine. We remand with instructions for the district court to expressly consider and determine the excessive fine issue.

III. CONCLUSION

The district court did not err in applying a preponderance of the evidence standard to determine that the Bieris' farm was forfeitable. The district court erred, however, by ordering forfeiture of only tract four of the four-tract farm, which was purchased in a single instrument as a single contiguous unit of property, without engaging in a proportionality analysis. Accordingly, we reverse the order of forfeiture and remand to the district court for the entry of a judgment forfeiting the entire

farm, unless the district court on remand determines the forfeiture of the entire farm amounts to a constitutionally excessive fine under the Eighth Amendment, in which case the district court should enter such judgment of forfeiture as it deems in accord with the Constitution.

JOHN R. GIBSON, Senior Circuit Judge, concurring in part and dissenting in part.

I agree with the court that the preponderance of evidence standard is proper in criminal forfeiture cases and that a proportionality analysis must be made. The district court understandably did not make such an analysis, as *Alexander v. United States*, 113 S. Ct. 2766 (1993), and *Austin v. United States*, 113 S. Ct. 2801 (1993), were not decided at the time of the district court's forfeiture decision. I respectfully dissent, however, on what constitutes "property" and the extent of forfeiture appropriate in this case. The court errs in looking only to the document conveying title to determine "property" for the purpose of forfeiture.

The court adopts the Sixth Circuit's rule in *Smith* that a court should look at the instrument or documents creating the property interest to determine whether the property is a single unit or divisible. *See* 966 F.2d 1045, 1053 (6th Cir. 1992). *Smith* is much different than the case before us today. The Smiths initially acquired the land through four separate conveyances. *Id.* at 1054. Upon the Smith's divorce, the wife conveyed her interest in the four tracts to her husband by a single quit claim deed. *Id.* The court found that the transfer by quit claim deed did not create Mr. Smith's interest, but rather that he obtained the property through four separate deeds. *Id.*

The district court then ordered only one tract forfeited. *Id.* at 1055-56.

Although the Bieris acquired all four tracts to their farm through a single general warranty deed, the deed described the four tracts separately, as tract one, tract two, tract three and tract four. Tracts two, three and four are located and taxed in Taney County, Missouri, and tract one is located and taxed in Ozark County, Missouri. In Missouri, land must be recorded in the real estate records of the county where it is located. *See* Mo. Rev. Stat. § 59.400 (1986 & Supp. 1993). Further, real property is taxed by the county of its situs. *See* Mo. Rev. Stat. § 137.010-137.960 (1986 & Supp. 1993) (Assessment and Levy of Property Taxes). In this case we should not look only to the deed or conveyance to determine whether the Bieris' farm, consisting of four tracts, is a single piece of property for forfeiture purposes. The question of whether the tracts are divisible for purposes of forfeiture is a factual issue, and indeed is intertwined with the proportionality issue.

I believe we should remand to the district court to consider several factual issues before ordering the forfeiture. First, the district court should determine whether the entire farm, certain tracts or only portions of certain tracts were "used, or intended to be used, in any manner or part, to commit, or facilitate the commission of" the drug trafficking. *See* 21 U.S.C. § 853. Although the record contains findings of fact by the district court that the farm was used to facilitate the drug trafficking, the court at sentencing ruled only that tract four be forfeited. I believe specific facts must be developed to demonstrate the extent of use of each of the tracts in the drug operation. The record is lacking in factual findings regarding which tract or

tracts facilitated the drug trafficking.

For example, the record shows that Ruiz delivered marijuana to the house and that drugs were stored in the barn. Both the house and barn are located on tract four. The government introduced evidence that it was necessary to drive over other tracts to reach the house. In *Smith*, the court held that real property used to conceal the commission of an offense created a sufficient nexus to find that it facilitated the drug trafficking. 966 F.2d at 1055-56. Here, the district court should consider whether the other tracts concealed or in any other way facilitated the Bieris' drug trafficking operation, and make detailed findings of fact in determining which tracts should be forfeited.

I would reverse the order of forfeiture and remand to the district court with instructions to make additional findings of fact and to enter an order of forfeiture for the tract or tracts of the Bieris' farm that facilitated their drug trafficking.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	) No.
	) 92-03044-01/02-CR-
	)S-4
SUSAN D. BIERI,	)
and	)
LEONARD BIERI, III,	)
	)
Defendants.	)

ORDER OF FORFEITURE

Based upon the evidence adduced and the declaration of Forfeiture entered previously in the above-styled case, and for the reasons stated at bar, it is hereby

ORDERED, ADJUDGED AND DECREED that pursuant to 21 U.S.C. §§ 846, 841(a)(1), and 853(a), the following property is hereby condemned and forfeited to the United States of America:

All that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, described as:

TRACT NO. 4 (TANEY COUNTY, MISSOURI) The

Northeast quarter of Section 24 and nine acres off of the Southwest Quarter of the Southeast Quarter of Section 13 beginning at the Southwest corner thereof thence North 145 yards, thence due East 165 yards, thence diagonally to the Southeast corner of said Southwest Quarter Southeast Quarter thence West 1/4 mile to place of beginning, all in Township 24, Range 17 and aggregating 169 acres more or less.

The Court finds that the above-listed forfeited asset constitutes property that was used or intended to be used, in some manner or part, to commit or facilitate the commission of the aforementioned violation.

It is further ORDERED that the above-listed property shall be seized forthwith by the United States Marshal for the Western District of Missouri or his duly authorized representative and disposed of in accordance with the law.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED:

1. That the United States Marshal is hereby ORDERED to record forthwith a copy of this Order in each county where the above-described real property is located, and which Order, when recorded, shall be notice to any transferee or potential transferees, of the interest of the United States of America therein.

2. That all of the aforementioned forfeited property is to be held by the United States Marshal's Service in their secure custody and control.

3. That pursuant to 21 U.S.C. § 853(n)(1), the United States Marshal forthwith shall publish at least once for three successive weeks in a newspaper of general circulation, notice of this Order, notice of the Marshal's intent to dispose of the property in such manner as the Attorney General may direct and notice that any person, other than the defendant, having or claiming a legal interest in the above-listed forfeited property must file a petition with the Court within thirty (30) days of final publication of notice or of receipt of actual notice, whichever is earlier.

This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the property, shall be signed by the petitioner under penalty of perjury, and shall set forth the nature and extent of the petitioner's right, title or interest in the forfeited property and any additional facts supporting the petitioner's claim and the relief sought.

4. The United States may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the Order of Forfeiture, as a substitute for published notice as to those persons so notified.

5. That upon adjudication of all third party interests, this Court will enter a Final Order of Forfeiture pursuant to 21 U.S.C. § 853(n), in which all interests will be addressed.

ORDERED this 22nd day of April, 1993

RUSSELL G. CLARK
Senior United States
District Judge

(2)

No. 95-1413

Supreme Court, U.S.
FILED
MAY 6 1996
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

SUSAN D. BIERI AND
LEONARD D. BIERI, III, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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App

QUESTIONS PRESENTED

1. Whether the district court erred as a matter of law when, in a purported exercise of judicial discretion, it declined to order the forfeiture of petitioners' farm under 21 U.S.C. 853(a)(2).

2. Whether the court of appeals engaged in improper fact-finding when it determined, based on findings of the district court and the facts of record, that forfeiture of petitioners' farm would not violate the Excessive Fines Clause of the Eighth Amendment.

3. Whether forfeiture of petitioners' farm constitutes an excessive fine under the Eighth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-16) is reported at 68 F.3d 232. The order (Pet. App. 17) and findings (Pet. App. 18-20) of the district court are not reported. A prior opinion of the court of appeals on the forfeiture issue (Pet. App. 23-37) is reported at 21 F.3d 819. A prior opinion of the court of appeals affirming petitioners' convictions is reported at 21 F.3d 811.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3) was entered on October 13, 1995. A petition for rehearing was denied on December 7, 1995. Pet. App. 2.

The petition for a writ of certiorari was filed on March 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Western District of Missouri, petitioners were convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and of conspiring to commit that offense, in violation of 21 U.S.C. 846.[1] Petitioner Susan Bieri was sentenced to 51 months' imprisonment, and petitioner Leonard Bieri was sentenced to 57 months' imprisonment. In addition, under 21 U.S.C. 853(a), petitioners were ordered to forfeit the portion of their farm that they had used to facilitate their drug trafficking activities. Pet. App. 24-25.

The court of appeals affirmed their convictions. Pet. App. 34-35. In a separate opinion, it remanded the forfeiture judgment to the district court with directions to forfeit the entire farm, unless the district court found on remand that such a forfeiture would constitute an excessive fine, in violation of the Eighth Amendment. *Id.* at 23-37. This Court denied certiorari. 115 S. Ct. 208 (1994).

On remand, the district court declined to impose forfeiture. Pet. App. 17-20. The court of appeals reversed and ordered that the entire farm be forfeited. *Id.* at 4-16.

1. The evidence at trial established that for at least two years petitioners used their farm in rural

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[1] Petitioners were acquitted of using a firearm during and in relation to a drug trafficking offense, in violation of 21 U.S.C. 924(c). Pet. App. 25.

Missouri to store and distribute marijuana. Their scheme was discovered on January 14, 1992, when an Oklahoma state trooper stopped a car driven by George Ruiz, who was transporting 45 pounds of marijuana from Arizona to petitioners' farm. Ruiz agreed to assist authorities by delivering the drugs and by tape recording conversations during the delivery. When Ruiz delivered the drugs to petitioner Susan Bieri at petitioners' house on January 15, she paid him $300 to cover his expenses, as she had done on previous deliveries. 21 F.3d at 814. Sheriff's deputies then executed a search warrant at the house and found the marijuana that Ruiz had delivered, plus an additional 96 pounds of marijuana, cash, a loaded gun, brown wrapping paper, and other drug paraphernalia located in the house and outbuildings on petitioners' farm. Pet. App. 24-25.

2. The district court determined that petitioners had used their property to facilitate drug trafficking. Pet. App. 25, 39. Section 853(a)(2) of Title 21 requires forfeiture of "any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, [any drug trafficking felony] violation." The court ordered forfeiture, however, not of petitioners' entire four-tract dairy farm, but only of tract four of that property, on which petitioners' house and barn were located. Pet. App. 5, 25, 39.

The court of appeals reversed the forfeiture order and remanded with directions to enter an order forfeiting the entire farm unless the court concluded that such an order would amount to a constitutionally excessive fine. The court of appeals held that Section 853(a)(2) requires forfeiture of an entire property if any part of it is used to commit or facilitate a drug

trafficking crime. Pet. App. 5-6, 30-33. It also held that, because petitioners acquired the entire four-tract farm at one time and by means of a single instrument, the entire farm should be deemed "property" subject to forfeiture under Section 853(a)(2). Pet. App. 6, 32. The court of appeals instructed, however, that, if the district court concluded on remand that forfeiture of the entire farm would amount to an excessive fine under the Eighth Amendment, the district court should order forfeiture of less than the whole property to fit the forfeiture "within the broad boundaries of constitutional proportionality." *Id.* at 33-34.

3. After an evidentiary hearing, the district court ruled that there would be no forfeiture whatsoever. The court opined that petitioners' sentences of imprisonment were "enough penalty for the criminal activity associated with the property," considering the fact that the property was used as a residence and business and that petitioners' two minor children were "dependent somewhat" upon the residence. Pet. App. 7, 19. The court reasoned that a district court normally has discretion whether to impose a fine, and stated that it would exercise similar discretion in this case not to impose any forfeiture. *Id.* at 7-8, 20. The next day, the court entered a written order finding that the reasonable value of petitioners' farm was "not less than $245,000" and "that it would be in the best interests of [petitioners'] children that they be permitted to remain at the residence which is located on the farm." *Id.* at 8, 17.

4. The court of appeals reversed. It held that the district court erred in treating forfeiture under Section 853(a)(2) as a matter of judicial discretion. The court explained that the district court's only inquiry

should be "whether the defendant used the property 'in any manner or part' to commit or to facilitate a drug trafficking offense. If so, criminal forfeiture under this statute is mandatory, not discretionary." Pet. App. 9. Here, because petitioners unquestionably used parts of their dairy farm to facilitate their drug trafficking offenses, the entire farm was subject to forfeiture as a matter of law. *Id.* at 9-10.

Addressing the application of the Eighth Amendment's Excessive Fines Clause, the court of appeals stated that whether a particular forfeiture is excessive involves an analysis of, among other things, the extent and duration of the criminal activity, the gravity of the offense weighed against the severity of the criminal sanction, and the value of the forfeited property. Pet. App. 11. Based on the facts determined by the district court, as well as its own examination of the record, the court found that the drug trafficking conspiracy in this case lasted nearly two years, that petitioners' farm was integral to the scheme, and that petitioners distributed or possessed for distribution some 85 kilograms of marijuana, which had a wholesale value of $233,750. *Id.* at 12. The court pointed out, in addition, that petitioners received sentences at the lower end of the applicable Sentencing Guidelines ranges, and that the district court imposed no fine whatever even though petitioners had been subject to fines of up to $6 million. *Id.* at 12-13. Accepting the district court's determination that the farm was worth at least $245,000, the court of appeals found no great imbalance between the gravity of the offenses and the severity of the forfeiture, *id.* at 13, and it ruled accordingly that the forfeiture was not constitutionally excessive, *id.* at 15.

The court of appeals rejected the district court's reliance on the intangible value of the property and the adverse impact of its loss on petitioners' children. It explained that, while such factors might have relevance in some cases, they did not justify a finding of constitutional excessiveness here, where the forfeiture was *in personam* and petitioners had knowingly and willfully used the farm—their home—to further their marijuana trafficking operation. Pet. App. 13-14.

Judge Gibson dissented. He agreed with the majority that the district court erred in failing to conduct an analysis under the Excessive Fines Clause, but he would have remanded the case once again to give the district court another opportunity to comply with the mandate of the court of appeals. Pet. App. 16.

ARGUMENT

1. Petitioners argue (Pet. 12-19) that the court of appeals violated established standards of appellate review by failing to apply the "clearly erroneous" standard to the district court's findings. That argument is without merit. The court of appeals properly rejected the district court's exercise of its supposed discretionary powers, because whether forfeiture is required under 21 U.S.C. 853(a)(2) is a question of law, not a matter of sentencing discretion. The statute provides, in relevant part, that "[a]ny person convicted of [an enumerated violation] punishable by imprisonment for more than one year *shall forfeit* to the United States * * * any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation." 21 U.S.C. 853(a)(2) (emphasis added). The courts of appeals that have analyzed the issue have

uniformly held that the statute *requires* forfeiture of an entire property when part of it is used to further a drug trafficking crime. See *United States* v. *Smith*, 966 F.2d 1045, 1053 & n.8 (6th Cir. 1992) (citing cases). The district court's view that it had discretion to waive forfeiture was not a factual finding subject to "clearly erroneous" review, but rather an (incorrect) interpretation of law, reviewable de novo.

Petitioners contend (Pet. 13-14) that, while the district court spoke in terms of sentencing discretion, it considered factors that are relevant to the constitutional permissibility of criminal forfeitures and actually based its decision not to order a forfeiture on the Excessive Fines Clause. That claim is refuted by the district court's own explanation: "As a normal rule, any time a fine is imposed within the statute or no fine is imposed, it's discretionary with the trial court. I don't know whether that's true in regard to a forfeiture or not but I'm going to test it." Pet. App. 20. That passage makes clear that the district court's decision was based, as the court of appeals concluded, "upon a purported exercise of discretion which did not and does not exist." *Id.* at 12. At no point did the district court articulate the view that forfeiture of petitioners' farm would constitute an excessive fine within the meaning of the Eighth Amendment.

2. Petitioners argue (Pet. 19-21) that the court of appeals engaged in fact-finding, and thereby deprived them of due process, when it determined that forfeiture of petitioners' farm was not an excessive fine within the meaning of the Eighth Amendment. Contrary to petitioners' argument, the court of appeals did not engage in fact-finding; rather, it appropriately and correctly analyzed petitioners' constitutional

challenge in light of the facts found by the district court and contained in the record.

The court of appeals did not ignore or dispute the district court's factual findings. It expressly recognized that the district court "made relevant fact-findings concerning the criminal sanctions imposed, the value of the farm, and its importance as a residence for [petitioners'] innocent minor children." Pet. App. 11-12. At the same time, however, the court of appeals recognized that the district court did not decide whether the forfeiture constituted an excessive fine under the Eighth Amendment. Although the court of appeals could have remanded for a second time with directions to the district court to analyze the constitutional question, it chose instead, permissibly, to decide for itself whether forfeiture in this case would constitute an excessive fine, "[b]ased upon [its] review of the facts found by the district court and of the record." *Ibid.*

The court of appeals pointed out that the record demonstrated that petitioners' criminal involvement lasted nearly two years; that petitioners' farm was integral to the marijuana distribution conspiracy; that petitioners had possessed or distributed 85 kilograms of marijuana from the farm; and that that marijuana had a wholesale value of some $233,750. Pet. App. 12.[2] The court concluded that the forfeiture was not grossly disproportionate in the constitutional sense, because the value of the property was roughly equivalent to the total dollar volume of petitioners'

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[2] Significantly, petitioners do not dispute the court of appeals' characterization of the facts of record on these (or indeed any other) points.

criminal activity and far less than the statutorily authorized fine for petitioners' offense. *Id.* at 15.

3. Finally, petitioners argue (Pet. 22-28) on the merits that forfeiture of the farm constitutes an excessive fine. Petitioners assert that the court below "properly determined that a multi-factor, proportionality test should be applied when the forfeiture of property is challenged as an excessive fine under the Eighth Amendment." Pet. 24.[3] They challenge only the court of appeals' weighing of those factors in the particular circumstances of this case.

Petitioners' primary contention is that the court of appeals erred in declining to give sufficient weight to certain intangible factors, such as the property's character as a residence and the effect of the forfeiture on petitioners' children. The court of appeals did not entirely discount intangible value, however. It explained that the intangible value of the property is a factor "whose importance diminishes as the duration and extent of the defendant's culpability and use of the property to facilitate criminal conduct rises." Pet. App. 14. That observation is consistent with this Court's statement in *Alexander* v. *United States*, 113 S. Ct. 2766, 2776 (1993), that whether a forfeiture is

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[3] Petitioners observe (Pet. 22-23) that there is a conflict among the courts of appeals as to whether excessiveness should be analyzed for Eighth Amendment purposes under a "proportionality" approach or instead under an "instrumentality" approach. This case is not an appropriate vehicle for resolving that conflict, however, because petitioners expressly support the multi-factor proportionality approach used by the court of appeals below. Moreover, the forfeiture of petitioners' farm would have been upheld under the instrumentality approach, in light of petitioners' substantial use of the house and outbuildings on the farm for storing and processing marijuana.

excessive must be considered in "light of the extensive criminal activities which [the defendant] apparently conducted through his [criminal] enterprise over a substantial period of time."

The court of appeals thus recognized that its multifactor approach to proportionality analysis would vary with the specific facts of each case. Pet. App. 14. Here, it determined that the intangible value of the farm was not sufficient to outweigh the other factors that supported forfeiture, especially petitioners' criminal culpability and use of the farm to conceal their criminal activities. *Id.* at 14-15.[4] That fact-bound conclusion is correct and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
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Attorney

MAY 1996

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[4] The court acknowledged that petitioners' children would suffer from the forfeiture, but pointed out that the children would suffer primarily not from the loss of the farm, but from petitioners' incarceration, which resulted from petitioners' decision to engage in criminal activity. Pet. App. 14.

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IN THE
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OCTOBER TERM, 1995

SUSAN D. BIERI
and
LEONARD D. BIERI, III,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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ARGUMENT

I. THE EIGHTH CIRCUIT COURT OF APPEALS VIOLATED ACCEPTED STANDARDS OF APPELLATE REVIEW BY FAILING TO APPLY THE "CLEARLY ERRONEOUS" STANDARD AND, IN SO DOING, VIOLATED THE DUE PROCESS RIGHTS OF PETITIONERS.

The Government argues that the district court's ruling rested solely upon a "'purported exercise of discretion which did not and does not exist,"' and that the court failed to find that the forfeiture of the farm constituted an excessive fine within the meaning of the Eighth Amendment. *See* Government Brief at 7 (quoting *United States v. Bieri*, 68 F.3d 232 (8th Cir. 1995); *See* Pet. App. at 12). The Government's argument is without merit.

Although the district court did not reiterate the words "excessive fines" when stating its ultimate conclusion, it clearly was applying an excessive fines analysis. If the district court had discarded such an approach in favor of an exercise of unbridled discretion, it would have had no reason to determine the proper test to apply in an excessive fines analysis or to make factual findings relevant to such an analysis. Clearly, the district court articulated the proper test from *United States v. One Parcel of Real Property Located at 9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994), and made relevant factual findings.

The Eighth Circuit improperly ignored these findings without finding them to be clearly erroneous. The appellate court's approach violated accepted standards of appellate review and also violated the Bieris' right to due process of law under the Fifth Amendment. The Eighth Circuit's substitute factual findings essentially reflect what that court concluded

from a "cold record"; its findings conflict with those of the district judge who had the opportunity to observe, firsthand, the witnesses and the defendants. As recognized in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), the district court is in a superior position to make factual findings. *Id.* at 574. The district court's expertise and its opportunity to observe the witnesses provide the basis for the traditional deference accorded that court as the trier of fact. *Id.*

In sum, the district court conducted a proper excessive fines analysis and did not simply exercise its discretion. The district court's factual findings correspond with the multi-factor proportionality test articulated in *One Parcel of Real Property Located at 9638 Chicago Heights* and provided the foundation for its ultimate ruling denying the forfeiture of petitioners' farm.

II. THE FORFEITURE OF PETITIONERS' FARM CONSTITUTES AN EXCESSIVE FINE WITHIN THE MEANING OF THE EIGHTH AMENDMENT.

The Government argues that the Eighth Circuit's "fact bound conclusion," which rejected the lower court's denial of forfeiture, is correct and does not warrant review by this Court. The Government's choice of words is revealing, as it acknowledges that the Court of Appeals engaged in a fact-laden analysis and reached a "fact bound" conclusion based on its examination of the record.

The Eighth Circuit's conclusion is erroneous and rests on a highly factual analysis by a court that did not observe, firsthand, the presentation of evidence.

Further, although the Eighth Circuit appeared to adopt a multi-factor, proportionality approach, it distorted the nature of

this approach by according negligible, if any, weight to certain "intangible" factors, such as the property's character as a residence and the effect of the forfeiture on innocent occupants (in this case, young children).

Contrary to the Government's argument, the petitioners' case presents the ideal vehicle for resolving the conflict among the circuits as to which test should be applied to excessiveness challenges under the Eighth Amendment. This case presents the Court with the opportunity to determine whether a multi-factor approach or an instrumentality approach (focusing on the nexus between the criminal activity and the property) should be applied and, further, the degree of importance that should be attached to the various factors enumerated under those tests. In *One Parcel of Real Property Located at 9638 Chicago Heights*, the Eighth Circuit implicitly recognized the sanctity and importance of the family home as a factor to consider in evaluating the excessiveness of a forfeiture. 27 F.3d at 331. Despite this precedent, the Eighth Circuit accorded little importance to the Bieris' claims regarding the intangible value of their property. The question of whether the property's character should be considered in an excessive fines analysis is thus squarely before this Court. This case presents a proper vehicle for this Court to determine what test to properly apply in an excessive fines analysis and to determine the specific factors that must be considered as a part of the test.

CONCLUSION

Based on the foregoing reasons as well as those stated in their Petition for Writ of Certiorari, petitioners respectfully request that this Court grant their petition for writ of certiorari

as to the decision of the Eighth Circuit Court of Appeals in *United States v. Bieri*, Case No. 95-1234WMS.

Respectfully submitted,

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